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No. 84-1173

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

UNITED TRANSPORTATION UNION, etc.,
Petitioner,

vs.

JOE VERNON SEARS, etc., et al.,
Respondents.

PETITIONER'S REPLY TO BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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Respondents erroneously contend that United Transportation Union (UTU) did not raise the issues in *Ford Motor Co. v. Equal Employment Opportunity Commission,* 458 U.S. 219 (1982), in the district court. Petitioner has earnestly urged throughout this litigation that it is not liable for back pay by virtue of the fact that it had no authority or ability to promote the train porters to positions as brakemen. See, e.g., Appendix at page 21 (proceedings during liability phase in 1978) and Appendix at page 97 (Tenth Circuit's summary of Union's position on first appeal, 1981).

The Tenth Circuit, significantly, did not find that UTU had waived this issue. Rather, the Tenth Circuit erroneously reasoned that because *Ford Motor* was argued April 20, 1982, because certiorari was denied in this case May 3, 1982, and because *Ford*

Motor was decided by this Court June 28, 1982, that the denial of certiorari was a ruling of affirmance. The Tenth Circuit states:

> [W]e believe that if the Supreme Court had thought [*Ford Motor* and certain other recent Supreme Court cases] required reconsideration of our opinion, it would have granted certiorari and summarily remanded the case for our reconsideration in light of its detemrinations. Appendix at page 4.

The Tenth Circuit, in its opinion of December 10, 1984, Appendix at page 4, 749 F.2d 1451, 1453-54, not only disregards this Court's 1982 decisions, decided since the earlier appeal (1981), but rules that the previous denial of certiorari in this case was an affirmance on the merits.

With the work load of this Court, it must leave to the courts of appeals the primary responsibility for appellate review. Except in extraordinary circumstances, the concept of "judicial ripening" is used by this Court as a means of limiting its certiorari jurisdiction to those cases not subject to further proceedings. *Maryland v. Baltimore Radio,* 338 U.S. 912, 918-19 (1950). The Tenth Circuit Court of Appeals in this case has attached significance to a denial of certiorari (when the case was subject to further proceedings, a remedial stage in the district court) and totally failed to address many substantial questions presented by the appeal. This Court's previous denial of certiorari was not a summary affirmance and should not have been so considered by the Tenth Circuit. *Hughes Tool Co. v. Trans World Airlines,* 409 U.S. 363, 366 n.1 (1973). The Tenth Circuit did not accept primary responsibility for the appellate review of this case in spite of admonitions by this Court that it should do so. *Hutto v. Davis,* 454 U.S. 370, 375 (1982).

Respondents erroneously contend that UTU waived its right to request apportionment of damages by not timely raising the issue in the district court. The record in this case clearly

establishes that UTU, during the remedial phase, timely requested the district court to apportion the relative degree of fault attributable to UTU and to reduce the total back pay award accordingly. (R. Vol. VIII at 3152 and 3165). This motion was denied by the district court. Appendix at page 120. On appeal, the Tenth Circuit ruled that apportionment is not available in a Title VII case, stating that this is not "an ordinary case of joint tortfeasors who were liable to each other for contribution. See *Restatement (Second) of Torts* §§886A & comment m, at 337, 343-44 (1979). . . This case is a Title VII action." Appendix at page 5.

Contrary to respondents' assertion that the decision of the Tenth Circuit does not resolve the apportionment issue (Brief in opposition at page 15), the Tenth Circuit clearly rules that a labor union in a Title VII case should *not* have its liability limited "to its 'share' of the fault". Appendix at page 6. The Union did not dispute, nor did it appeal, the Santa Fe's settlement with the class (it was without standing to do so). Rather, it timely raised in the district court at the remedial phase the request that the relative degree of fault attributable to UTU be determined and that the total back pay award be reduced accordingly.

Finally, respondents contend that UTU is "responsible" for back pay for the failure to promote train porters to brakemen positions. This case was submitted to the district court entirely on stipulated facts. UTU was found liable for back pay differentials resulting from the failures to promote when the stipulated evidence conclusively established that it was without power or authority to cause the promotions to occur. 42 U.S.C. §2000e-5(g) provides in pertinent part:

> The court may . . . order . . . back pay (payable by the employer . . . or labor organization, as the case may be, *responsible for the unlawful employment practice*) . . . (emphasis added).

Notwithstanding the respondents' attempts to confuse and obfuscate the facts in this case, the **STIPULATED** evidence provides a straight forward and clear record upon which to adjudicate very important issues raised by the certiorari petition, namely when and to what extent a labor union is "responsible" for back pay in a Title VII case.

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Tenth Circuit.

Respectfully submitted,

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